No. 15,533

United States Court of Appeals

For the Ninth Circuit

BUILDERS CORPORATION OF AMERICA, a corporation, and HERLONG SIERRA HOMES, INC., a corporation,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR THE APPELLANTS.

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Subject Index

Table of Authorities Cited

Cases

Rules

Statutes

Texts

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I.

JURISDICTION.

This is an appeal from a judgment of the United States District Court for the Northern District of California, Northern Division (Cl. Tr., p. 36). Notice of Appeal to this Honorable Court was timely filed (Cl. Tr., p. 37). The causes of action were for damages under the Federal Tort Claims Act, 28 U.S.C. Sections 1346(b), 2671-2680. Jurisdiction is conferred on the District Court under 28 U.S.C. Section 1346(b). Jurisdiction is conferred on this Court under 28 U.S.C. Sections 1291 and 1294.

II.

STATEMENT OF THE FACTS.

Appellants filed their action for damages against the United States under the Federal Tort Claims Act, 28 U.S.C. Section 1346(b) and Sections 2671-80 (Cl. Tr., pp. 3-25). Appellee filed its motion to dismiss (Cl. Tr., pp. 25-26), which was sustained by the District Court (Cl. Tr., pp. 26-35), and thereafter the District Court entered judgment for the defendant (Cl. Tr., pp. 36-37).

The complaint is in two counts. The allegations of facts are substantially the same in both counts, except that in count one, the defendant is charged with wilful conduct, whereas in count two, the defendant is charged with negligent conduct. The complaint paints the following picture:

The United States owns, operates and maintains a military installation known as the Sierra Ordnance Depot. This Depot is a Federal enclave located in Lassen County, California, in a desolate and isolated area. The nearest points of urban development are Susanville, California, approximately forty miles northwest of the Depot, and Reno, Nevada, approximately fifty-six miles southeast of the Depot. Military and civilian personnel employed at the Depot by the United States are quartered on or near the Depot (Cl. Tr., p. 4). The complaint names certain individuals who were duly authorized agents and employees of the defendant and alleges that the actions chargeable to them were within the scope of their respective offices and employment (Cl. Tr., pp. 5-6).

A critical housing shortage prevailed at the Depot which impeded or threatened to impede the effective operation of the Depot. Because of this housing shortage, negotiations were carried on between the Department of Defense and the Federal Housing Administration and the Housing and Home Finance Agency (both Federal agencies) to obtain construction of four hundred fifty-six (456) dwelling units to adequately house civilian and military personnel employed at the Depot. These negotiations were carried on pursuant to the authority conferred upon these Federal Agencies under the National Housing Act approved June 27, 1934 (48 Stat. 1246, 12 U.S.C. 1702) and under the Act of August 8, 1949 (63 Stat. 570), which required private enterprise to undertake the investment risks in such projects. The negotiations culminated in the issuance on October 24, 1951, by the Secretary of the Army acting in pursuance of his authority, of a certification to the Federal Housing Administration that one hundred thirteen (113) family units in multiple family structures and twelve (12) single family structures were necessary to provide adequate rental housing for civilian and military personnel assigned to duty at the Sierra Ordnance Depot; that such military installation was deemed to be a permanent part of the Department of the Army and that there was no present intention to substantially curtail activities at such installations (Cl. Tr. pp. 6-11).

At the request of the Department of the Army, the Housing and Home Finance Agency, with the approval of the Department of the Army, programmed an addi-

tional one hundred fifty (150) family dwelling units for rental housing for civilian and military personnel of the Sierra Ordnance Depot (Cl. Tr., p. 12). Thereafter, pursuant to statutory authority, the Federal Housing Administration agreed to insure a mortgage on the one hundred twenty-five (125) dwelling units in the amount of One Million One Hundred Thirteen Thousand Seven Hundred and no/100 Dollars ($1,113,-700.00). By reason of the representations made by the Department of the Army and the commitments of the Federal Housing Administration, the appellant Herlong Sierra Homes, Inc., filed its application, received approval, and thereafter undertook to construct the one hundred twenty-five (125) dwelling units in accordance with specifications, plans and drawings issued and approved by the Department of the Army and the Federal Housing Administration and agreed to reserve the completed dwelling units for rent to civilian and military personnel of the Sierra Ordnance Depot. Subsequently, appellant Herlong Sierra Homes, Inc., fully complied with all of the conditions and requirements for the construction of the one hundred twenty-five (125) dwelling units and all of said dwelling units were completed and ready for occupancy in January, 1954 (Cl. Tr., pp. 12-14).

Appellant, Builders Corporation of America, by reason of the representations made by the Department of Defense and the commitment of the Federal Housing Administration to insure a mortgage of One Million Two Hundred Sixty One Thousand Three Hundred and no/100 Dollars ($1,261,300.00) for the dwelling

units programmed by the Housing and Home Finance Agency, received approval and thereafter undertook to construct the one hundred fifty (150) dwelling units in accordance with plans, specifications and drawings issued and approved by the Department of Defense and the Federal Housing Administration and in accordance with the provisions of the National Housing Act as amended and the rules and regulations promulgated thereunder (Cl. Tr., p. 14). The total investment in the properties by appellants amounted to Two Million Six Hundred Seventy-five Thousand and no/100 Dollars ($2,675,000.00), composed of the mortgage loans amounting to Two Million Three Hundred Seventy-five Thousand and no/100 Dollars ($2,375,-000.00) and Six Hundred Thousand Dollars ($600,-000.00) expended or obligated by appellants for the construction of the dwelling units (Cl. Tr., p. 15). Upon completion of the project, or even before, directives and orders previously determined upon were issued by the Department of Defense to initiate and develop a coordinated and aggressive program to assure maximum occupancy of the two hundred seventy-five (275) dwelling units constructed by the appellants. Among the orders and directives issued by the Department of Defense to the Depot employees in charge were the following:

> (a) An income limitation with a sliding scale for dependents was to be established above which military and civilian personnel would not be permitted to occupy the substandard existing government housing.

(b) Notices were to be served upon all tenants of government housing whose incomes were above the salary limit directing them to vacate their quarters not later than September 1, 1954.

(c) Notices were to be served on tenants of government housing who were not employees of the Department of the Army, but rendering service to the Depot that, unless post housing was guaranteed to these tenants under a contract or operating agreement, they were to vacate their government housing not later than September 1, 1954.

(d) One hundred twenty-five (125) substandard family quarters were to be selected for demolition (Cl. Tr., pp. 15-17).

Appellants then charge that the named employees of the defendant wilfully refused to carry out these orders and attempted to and did induce, persuade, coerce and entice military and civilian personnel from moving into the dwelling units constructed by appellants; that said employees, acting within the scope of their authority and employment, by threats and intimidation and abuse of the authority vested in them by virtue of their respective positions, sought to and did preclude and prevent the military and civilian personnel from moving into said dwelling units constructed by appellants, and that said employees and each of them acting within the scope of their authority and employment attempted to and did induce and incite the military and civilian personnel to interfere

with the occupancy of the dwelling units and of the rights and privileges granted by the United States to the appellants; that by reason of the wrongful acts of the defendant, its employees and agents, appellants were damaged in the sum of Three Million Four Hundred Seventy-five Thousand and no/100 Dollars ($3,475,000.00) (Cl. Tr., pp. 20-21).

Count two alleges that the named employees, agents of the defendant, acting within the scope of their respective offices and employment, carelessly and negligently failed and refused to carry out the orders issued by the Department of Defense, carelessly and negligently failed and refused to initiate or implement any program to assure maximum occupancy of the dwelling units constructed by appellants, carelessly and negligently failed and refused to establish income limits for those who were to occupy the houses owned and operated by the defendant, carelessly and negligently failed and refused to demolish any of the temporary and substandard housing and carelessly and negligently failed and refused to issue notices to those specified in said orders to vacate the said housing not later than September 1, 1954 (Cl. Tr., pp. 22-23); that by reason of the negligence and careless acts of the defendant, its employees and agents, appellants were damaged in the sum of Three Million Four Hundred Seventy-five Thousand and no/100 Dollars ($3,475,000.00) and sought judgment therefor. (Cl. Tr., p. 25.)

Thereafter the defendant filed its motion to dismiss upon the following grounds:

1. To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

2. To dismiss the action because the Court lacks jurisdiction over the subject matter of the action pursuant to the provisions of the Federal Tort Claims Act, 28 U.S.C. Sections 1346(b), 2671, et seq. (Cl. Tr., pp. 25-26.)

On February 19, 1957, the District Court entered its Memorandum and Order sustaining the motion to dismiss (Cl. Tr., pp. 26-35). On March 2, 1957, the Court entered its judgment for the defendant.

III.

THE ISSUE INVOLVED.

The issue involved in this appeal is whether either count one or count two of the complaint, or both, sets forth a justiciable cause of action against the United States under the Federal Tort Claims Act, 28 U.S.C. Sections 1346(b) and 2671-2680.

IV.

SUMMARY OF ARGUMENT.

1. The motion to dismiss admits all facts well pleaded and all facts that reasonably could be inferred from the facts alleged.

2. The test of governmental liability under the Federal Tort Claims Act, absent a cause of action based on the exceptions enumerated in 28 U.S.C. Section 2680, is whether, under state law, there would be liability if a private person had committed the wrong complained of.

3. The complaint sets forth a justiciable cause of action under the law of the State of California.

4. The tortious conduct chargeable to the defendant did not involve a discretionary function within the meaning of the exception set forth in 28 U.S.C. Section 2680(a).

5. The wrongful conduct chargeable to the defendant was not a tort which could be classified as "an interference with contract rights."

V.

ARGUMENT.

1. THE MOTION TO DISMISS ADMITS ALL FACTS WELL PLEADED AND ALL FACTS THAT REASONABLY COULD BE INFERRED FROM THE FACTS ALLEGED.

The defendant filed its motion to dismiss on jurisdictional grounds under authority of Rule 12(b) (1), Federal Rules of Civil Procedure, 28 U.S.C. Such a motion admits all facts well pleaded and all facts that reasonably could be inferred from the facts alleged.

Gibbs v. Buck (1938), 307 U.S. 66, 59 S.Ct. 725, 63 L.Ed. 1111;

Amos v. Prom (1953), 115 Fed. Supp. 127.

2. THE TEST OF GOVERNMENTAL LIABILITY UNDER THE FEDERAL TORT CLAIMS ACT, ABSENT A CAUSE OF ACTION BASED ON THE EXCEPTIONS ENUMERATED IN 28 U.S.C. SECTION 2680, IS WHETHER, UNDER STATE LAW, THERE WOULD BE LIABILITY IF A PRIVATE PERSON HAD COMMITTED THE WRONG COMPLAINED OF.

The Federal Tort Claims Act makes the United States liable for tort claims "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. Sections 2671-2680; *Rayonier v. United States* (1956), 352 U.S. 315, 77 S.Ct. 374, 1 L.Ed. (2d) 354; *Indian Towing Company v. United States* (1955), 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48.

The Tort Claims Act waives the defense of sovereign immunity to claims against the United States arising in tort. It makes the United States liable "for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting in the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

In *Rayonier,* the Supreme Court had before it the question of whether the United States were liable under the Federal Tort Claims Act for damages caused by carelessness of the Forest Service in fighting forest fires. Referring to the language of the Act, the Court states (p. 358):

> "These provisions, given their plain natural meaning, make the United States liable to peti-

tioners for the Forest Service's negligence in fighting the forest fire if, as alleged in the complaint, Washington law would impose liability on private persons or corporations under similar circumstances."

In *Maryland v. United States,* 165 Fed. (2d) 869, the Fourth Circuit, speaking through Justice Parker, states (p. 871):

> ". . . Congress was creating a liability not theretofore existing on the part of the government. To have defined all tort rules under which liability could be established would have been an almost impossible undertaking, but standards of liability were necessary and Congress was compelled, as a practical matter, to adopt the principles of local law in defining them . . . "

The fact that the tortious conduct chargeable to the employees of the defendant was performed in a governmental capacity does not affect the question of liability even if there was no identical private activity to which such conduct could pertain. This was clearly enunciated in *Indian Towing Company.* Here the cause of action was based on the alleged negligence of the Coast Guard in the operation and maintenance of a lighthouse. In disposing of the Government's argument that the act was a peculiarly governmental activity, the opinion states (p. 67):

> ". . . we would be attributing bizarre motives to Congress were we to hold that it was predicating liability on such a completely fortuitous circumstance . . . the presence or absence of identical private activity."

The basis of liability was set forth in the following language (p. 69):

> "The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a lighthouse on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act."

It is thus clear that if the conduct chargeable to the defendant is actionable under California law, recovery may be had under the Federal Tort Claims Act.

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3. THE COMPLAINT SETS FORTH A JUSTICIABLE CAUSE OF ACTION UNDER THE LAW OF THE STATE OF CALIFORNIA.

The complaint alleges the substandard living conditions of the personnel quartered at the Sierra Ordnance Depot; the urgent need for improved living accommodations; the intense activity of the Department of Defense to obtain private enterprise to construct adequate quarters in the desolate and isolated area in which the Depot was located; and an investment of more than three million dollars in the project by the appellants. The complaint points out that unless government personnel were made available as tenants, this large investment would be lost. To forestall such

inequitable result, the Department of Defense initiated a program and issued its orders and directives to implement the program.

Failure on the part of the government employees to carry out the orders and directives could result in grievous and extensive losses to appellants.[1] The complaint charges that the employees named therein wilfully or negligently failed to carry out the orders and directives resulting in damages to the appellants.

It is conceded that the factual situation is perhaps novel. But, as the Supreme Court states in *Rayonier,* at page 319:

> "It may be that it is 'novel and unprecedented' to hold the United States accountable for the negligence of its firefighters, but the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability . . ."

The standard of care prescribed in situations which may not come within the familiar classification of tort actions is set forth in Section 1708, Civil Code of the State of California. This section provides:

> "Every person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his rights."

The conduct chargeable to the defendant is certainly of a kind from which reasonable men would realize

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[1]Since the initiation of this action and during the pendency thereof, the 150 additional units have been lost through action for possession under the mortgage.

that injury to the appellant would occur. Moreover, the action of the government in setting up a program and issuing its orders and directives to implement the program, *even though voluntary on its part,* created a right on the part of the appellant and a correlative duty on the part of the government to properly carry out the program and to properly comply with the orders and directives issued. In *Perry v. D. J. & T. Sullivan Co.* (1933), 219 Cal. 386, 26 Pac. (2d) 485, the Court holds that:

> "One who undertakes to do an act or perform a service for another is bound to use reasonable care and skill in the performance thereof and is liable for his failure in this respect, although his undertaking was purely voluntary and he was not under any obligation to do such act or perform such service . . ." (p. 390).

In *Dahms v. General Elevator Co.* (1932), 214 Cal. 733, 7 Pac. (2d) 1013, recovery was allowed for injuries sustained by an elevator operator as a result of careless maintenance of the elevator by the defendant. The defendant's responsibility for maintenance derived from a contract between the defendant and the owner of the property. The defendant claimed it owed no duty to the plaintiff, the elevator operator, but this contention was disposed of by the Court in holding that section 1708 of the Civil Code, at least in part, established a duty on the part of the defendant to the plaintiff. See also *Jaehne v. Pac. Tel. and Tel. Co.* (1951), 105 Cal. App. (2d) 683, 234 Pac. (2d) 165, *McCall v. Pacific Mail S.S. Co.* (1898), 123 Cal. 142, 55 Pac. 706.

4. THE TORTIOUS CONDUCT CHARGEABLE TO THE DEFENDANT DID NOT INVOLVE A DISCRETIONARY FUNCTION WITHIN THE MEANING OF THE EXCEPTION SET FORTH IN 28 U.S.C. SECTION 2680(a).

The Government's principal contention was that there was no liability by reason of the exception in 28 U.S.C. Section 2680(a), which provides that the Federal Tort Claims Act shall not apply to

> "(a) any claim based upon . . . the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal Agency or an employee of the Government, whether or not the discretion involved be abused."

Appellants contend that the action and conduct of the defendant did not involve an exercise of discretion. The complaint specifically points out that the bases of the complaint for which the damages are claimed were not within the policy making discretion of the employees but were either wilful or negligent acts directly contrary to orders properly issued to implement a plan which had been adopted by the government and that by reason of the wilful or negligent failure of these employees to carry out these orders the appellants suffered damages.

Perhaps the best discussion on the meaning of the term "discretion" as used in the Federal Tort Claims Act is found in *Smith v. United States* (1953), 113 Fed. Supp. 131. That case involved an action under the Federal Tort Claims Act for damages to plaintiff's business resulting from alleged negligent construction and maintenance of New Castle Air Base. The com-

plaint alleged that the negligent and wrongful activities and omissions of the Government consisted in the manner in which the Air Base was constructed and maintained. It charged that the defendant changed the grade and contour of the upstream land so as to increase the drainage of surface waters with the result the creek banks and much sand and gravel were washed downstream, eventually filling plaintiff's reservoir which was used in his business. The Government filed a motion to dismiss on the ground that the actions in the construction and maintenance of the Air Base came within the discretionary clause of the Federal Tort Claims Act. In distinguishing between that which is discretionary and that which is not discretionary, the Court gives the key test in the following language:

> ". . . it seems the Government agency or employees must have freedom to decide whether to perform the pivotal act from which the alleged tortious consequences arise or not so to act. *When a statute, ordinance, or other proper authority imposes a duty upon the Government agency to act in a prescribed manner, no discretion is involved in assuming that duty, and the details of discharging it are impliedly non-discretionary.* Conversely, when there is no obligation to act in the sphere of jurisdiction assigned to the governmental agency, the election not to act, of which the plaintiff complains is discretionary . . ." (Italics supplied.)

The Court further points out (page 136):

> ". . . there is a wide area of governmental activities following and attendant upon, in more or less degree, the exercise of official discretion for which

the United States has shed its cloak of immunity to suit by the Federal Tort Claims Act . . ."

In *Oman v. United States* (1949), 179 Fed. Rep. (2d) 738, an action was brought under the Federal Tort Claims Act charging that government employees of the Grazing Service who were in charge of grazing activities on the public domain in the San Rafael District, Utah, had wrongfully aided, allowed, and encouraged other livestock operators to utilize the public domain upon which plaintiff had been granted exclusive grazing privileges.

Plaintiff further alleged that his predecessors in interest had been granted exclusive grazing privileges on the public domain and when plaintiff notified employees of the grazing service of his acquisition of the leaseholds of his predecessors in interest, said employees represented that they would cancel the exclusive privileges granted to plaintiff's predecessors and would issue such privileges to the plaintiff. Plaintiff alleged that, contrary to these representations, said employees failed and refused to cancel the grazing privileges of plaintiff's predecessors in interest and negligently, wrongfully, and with the intent to injure plaintiff, permitted, aided, and directed others to use said lands.

The District Court dismissed on the ground that the complaint failed to state a cause of action. Reversing the action of the District Court, the Circuit Court states (page 740):

"Eliminating the claim arising out of misrepresentation, the tortious acts, if any, bringing this

case within the jurisdiction of the federal courts, consist of aiding and encouraging other livestock owners to utilize the grazing lands adjacent to the lands owned in fee, and of aiding and directing similar acts, with intent to injure and destroy plaintiff's exclusive grazing privileges, coupled with the refusal to cancel plaintiff's predecessor's permits, on the grazing lands adjacent to the leaseholds.

"Such acts are not within the exception to the Tort Claims Act based upon discretionary functions. *No government employee is granted the discretion whether he shall induce or incite third persons to interfere with exclusive rights or privileges granted by the United States.* It may be that certain of defendant's employees would have had the discretionary authority to take steps to revoke or cancel plaintiffs' exclusive grazing privileges, but no such steps appear to have been taken in this case . . ." (Italics supplied.)

The Court further states at page 741:

"The remaining question is whether the acts alleged constituted a redressible wrong for which the United States, if a private citizen, would be liable. *All persons who advise, instigate, aid, encourage or direct a wrongful act are as liable as if they had performed the act themselves.*" (Italics supplied.)

In *Hernandez v. United States* (1953), 112 Fed. Supp. 369, employees of the United States erected a road block on a road exclusively under the control of the United States. The plaintiff while driving a motor-

cycle was injured when riding into the road block and it was claimed that the employees of the United States were negligent in failing to place proper warning signals. The Government contended that the placing of a road block and warning signals were discretionary functions. In denying the motion to dismiss, the Court states (page 371):

> ". . . It may be assumed arguendo that the erection of a road block is a discretionary function. However, after having exercised its discretion to erect the road block, the Government had the absolute duty to properly and adequately warn passers along the road of the hazard created. There is certainly no discretion not to warn the foreseeable motoring public of the danger ahead . . ."

In *Somerset v. United States* (1951), 193 Fed. (2d) 631, the plaintiff sought to recover for loss of an oyster boat stranded on a wreck of a ship which had been sunk in navigable waters. Plaintiff claimed that the loss was due solely to the negligence of the Government in creating and marking the wreck. The Court held that marking the wreck was not a discretionary function, but also stated (page 635):

> ". . . even if the decision to mark or remove the wreck be regarded as discretionary, there is liability for negligence in marking after the discretion has been exercised and the decision to mark has been made. There is certainly no discretion to mark a wreck in such a way as to constitute a trap for the ignorant or unwary rather than a warning of danger."

In *Dishman v. United States* (1940), 93 Fed. Supp. 567, plaintiff sued under the Federal Tort Claims Act for injuries sustained as a result of doctor employee of a Veterans Hospital erroneously pouring carbolic acid in his ear. The Court held the discretionary function exceptions did not apply. The Court stated (page 571):

> ". . . This is not a case in which in the exercise of discretion or judgment, the officials of the Veterans Hospital declined to give plaintiff treatment, but it is a case where having exercised their discretion to give treatment, in accordance with the applicable regulations, the treatment given was negligent."

The distinction between non-actionable planning and actionable negligence in carrying out the plan, was clearly stated by the Supreme Court in *Johnston v. District of Columbia,* 118 U.S. 19, 6 S.Ct. 923, 30 L.Ed. 75. Johnston's property was damaged when a sewer overflowed. He sued the District of Columbia, alleging that it "knowingly construed and continued upon an unreasonable and defective plan, and of inadequate capacity for its purpose, and wrongfully permitted [it] to become clogged up." The Court said at pages 20-21:

> "The duties of the municipal authorities, in adopting a general plan of drainage, and determining when and where sewers shall be built, of what size and at what level, are of a *quasi* judicial nature, involving the exercise of deliberate judgment and large discretion, and depending upon considerations affecting the public health and gen-

> eral convenience throughout an extensive territory; and the exercise of such judgment and discretion, in the selection and adoption of the general plan or system of drainage, is not subject to revision by a court or jury in a private action for not sufficiently draining a particular lot of land. But the construction and repair of sewers, according to the general plan so adopted, are simply ministerial duties; and for any negligence in so constructing a sewer, or keeping it in repair, the municipality which has constructed and owns the sewer may be sued by a person whose property is thereby injured."

So it is with the case at bar. There is no question that the decision to obtain private contractors to construct adequate housing at Sierra Ordnance Depot was within the discretion of the agency of the Federal Government involved, and it possibly could be successfully argued that a decision to issue orders and initiate a program for the occupancy of such housing was also a discretionary function. However, the complaint clearly establishes that both of those decisions were made. The implementation of these decisions by the employees at the Depot was an operational matter and in the performance of their duties no discretion was vested in them of a kind which would bring this case within the discretionary function exception in 28 U.S.C. 2680(a).

5. THE WRONGFUL CONDUCT CHARGEABLE TO THE DEFENDANT WAS NOT A TORT WHICH COULD BE CLASSIFIED AS "AN INTERFERENCE WITH CONTRACT RIGHTS".

The District Court grounded its judgment on the exception to governmental liability set forth in 28 U.S.C. 2680(h) which provides that the Federal Tort Claims Act shall not apply to "any claim arising out of . . . interference with contract rights . . ." There has been no clear cut judicial construction of the phrase "interference with contract rights." Some general rules of statutory construction might be helpful. Perhaps, the best was stated by Justice Frankfurter in *Indian Towing* at pages 68-69:

> "The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws. Of course, when dealing with a statute subjecting the Government to liability for potentially great sums of money, this Court should not promote profligacy by careless construction. Neither should it as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it."

The impact of the Tort Claims Act is general, not particular. The liability imposed by this Act constitutes a general waiver of sovereign immunity to tort claims against the United States. The exceptions are specific. In view of the difficulty of any sensible all inclusive definition of the term "tort," we might refer to a statement made by Dean Prosser in his well known work on the Law of Torts:

> ". . . No better general statement can be made, than that the Courts will find a duty where, in general, reasonable men would recognize and agree that it exists." (Section 31, p. 181.)

The complaint clearly establishes a duty on the part of the defendant. The question, therefore, is whether the duty shown by the allegations of the complaint falls within the classification of tort actions commonly known as "interference with contract rights." The District Court, in holding that the cause of action involved an interference with contract rights, predicated its opinion in large part on the fact that the appellants were seeking recovery for a loss of rental income. Actually, however, loss of rental income constituted a relatively minor portion of the damages sued for. The complaint established that the appellants had an investment in the property of more than three million dollars; that this property, which was owned by the appellants, depreciated in value and, in fact, would be lost by reason of the negligent or wilful acts of the defendant. *In brief, the failure of the government's employees to properly carry out the program resulted in a loss in the value of the property.* The Federal Tort Claims Act allows recovery for injury or damage to property resulting from wilful acts or omissions.

There is a basic distinction between the case at bar and the usual case of interference with contract rights. If the complaint charged nothing more than an interference with prospective tenants of the appellants, we would have a more or less clear case of interference with contract rights or interference with prospective profits or gains. In the case at bar, however, more than

that is alleged. The Department of Defense had set up a clear cut procedure as a result of which certain rights vested in appellants, at least the right to have that procedure properly implemented by the employees of the defendant. The complaint alleges, and the motion to dismiss admits, that this procedure was established and was not implemented either because of a wilful refusal or a negligent failure. Reasonable men would have realized that failure to implement the program would result in damage to the appellants and that the damages which would probably result from such failure would be a diminution in the value of the property. From this it follows that the causes of action alleged in the complaint are outside the scope of the concept "interference with contract rights."

It is respectfully submitted that the complaint states a cause of action.

VI.

CONCLUSION.

Appellants respectfully contend that the cause should be reversed and remanded with directions to the District Court to overrule the motion to dismiss and to require the defendant to plead.

Dated, Sacramento, California,
June 19, 1957.

Respectfully submitted,
LANDIS, BRODY & MARTIN,
Attorneys for Appellants.